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CHARLES E. PERKINS,)
)
Appellant,)
)
vs.) No. 46A04-0809-CV-512
)
MICHAEL MITCHEFF, M.D., and)
KARLA FOSTER,)
)
Appellees.)

February 26, 2009

BAILEY, Judge

Case Summary

Charles E. Perkins (“Perkins”) appeals the trial court’s grant of Michael Mitcheff, M.D.’s (“Dr. Mitcheff”) motion for summary judgment. We affirm.¹

Issue

Perkins raises the sole issue of whether the trial court erred in granting Dr. Mitcheff’s motion for summary judgment.

Facts and Procedural History

The following are the facts most favorable to Perkins, the nonmovant. He was incarcerated with the Indiana Department of Correction (“DOC”). Dr. Mitcheff practiced at the Indiana State Prison in Michigan City, Indiana.

On June 17, 1998, the DOC provided Perkins with a left ocular prosthesis that was “improperly designed and fitted.” Appellee’s Appendix at 29. Over time, it stretched his upper eyelid, sometimes fell out, and caused bleeding, discharge, pain, and headaches. James Johnston, the certified ocularist who designed the prosthesis, adjusted it twice in early 1999. During an evaluation on August 15, 2002, Perkins was informed that he “was wearing an improperly designed prosthesis which needs to be replaced with a new one to relieve the pain of discomfort and prevent future health problems.” Id.

On a DOC referral form in 2002, someone wrote,

Because the prosthesis is so buldgy [sic], it is creating undue pressure on the lower lid. Unless the prosthesis design is appropriately changed, the patient is going to require reconstructive surgery and still need a new and improved design to eliminate inappropriate pressure on the lower lid and fornix.

¹ Perkins does not appeal the trial court’s grant of Karla Foster’s motion for summary judgment.

Id. at 41. DOC physician Dr. James VanFleit signed a DOC form on October 16, 2002, referring Perkins back to Johnston. A DOC Superintendent signed the form a month and a half later. Johnston concluded that Perkins had

a severe upper eyelid ptosis (droop), most likely due to levator muscle elongation or levator aponeurosis dis-attachment. Correction of this droop cannot be corrected prosthetically without eye appearing somewhat “bulgy” and coming out easily.

This patient requires lid surgery[.] [F]urther prosthetic fitting without such surgery would result in similar problems/complaints.

Id. at 43 (emphasis in original).

Dr. Mitcheff and Perkins discussed a surgical procedure to “eliminate the droopy eyelid” and “receive a new prosthesis” “that would look exactly like Plaintiff’s real eye.” Id. at 30. Perkins agreed to the surgery, which was performed at Wishard Memorial Hospital on September 24, 2003. A portion of Perkins’ upper left eyelid was removed.

On October 20, 2003, a DOC employee wrote a memo stating,

Doctor [James] VanFleit said Mr. Perkins [] has an artificial eye and it’s too big and that’s why his eyelid is ripping. Mr. Perkins was told to write a request to Karla Foster requesting a proper fitting eye.

Id. at 45 (emphasis added). A week later, Dr. VanFleit referred Perkins to Kathy Hetzler, an ocularist in Indianapolis. The referral form contained the signatures of Dr. VanFleit and a DOC Superintendent. In the substantive portion of the form appeared the handwriting of two people, providing as follows:

SECTION B – CONSULTATION AND/OR PROCEDURE REQUEST

Condition requiring treatment, summary of treatment for condition and all history pertinent to consultation request:

[handwriting #1]

Per Dr VanFleit

Evaluation of existing prosthesis for a new prosthesis

[handwriting #2]

12/2/03

#1 Start app't for the fitting. fabrication of a left ocular prosthesis.

12/30/03

#2 [illegible], coloring of left ocular prosthesis

1/8/04

#3 Delivery of ocular prosthesis

Ocularist: [illegible signature]

Id. at 46. According to Perkins,

The first visit went well. The second, Ms. Karla Foster, here at [DOC], stopped the process. I was told by the doctor here at [DOC] that “the eye was too expensive,” and about some cosmetic policy that the medical department has as a reason for denying me.

Id. at 48. During the second appointment, in his words, “[DOC] officers were ordered to discontinue the treatment and return Plaintiff to the prison, ‘immediately.’” Id. at 30. If Perkins had understood that he would not receive a new prosthesis, he would have denied consent to the surgical procedure.²

Perkins submitted Step 1 and Step 2 grievances to the DOC, seeking a new prosthesis.

The DOC responded that a “conformer” had been approved because it was medically

² On a form documenting Perkins’ follow-up visit at Wishard Hospital, a hospital employee wrote, “Looks good. Ideally would have new prosthesis, but state will not fund.” Appendix at 47.

necessary and would “preserve[] the ability for [Perkins] to get a prosthetic [sic] eye” upon release from incarceration. Id. at 49. Finally, in a letter dated July 19, 2004 regarding Step 5, a DOC physician in Indianapolis wrote that the “Department supported surgery on your eyelid not because it wanted to facilitate placement of a cosmetic eye, but rather because if [sic] believed that the lid problem required repair ‘in and of itself.’” Id. at 50.

As stated in Perkins’ complaint, “[t]he last attempt by Dr. Michael Mitcheff to correct the faulty prosthesis was on August 26, 2004.” Id. at 31. This was the last chronological reference to Dr. Mitcheff in Perkins’ complaint. Perkins was in Dr. Mitcheff’s care until September 7, 2005.

On December 20, 2006, Perkins filed a proposed complaint with the Indiana Department of Insurance (“DOI”) against Dr. Mitcheff and others. Pro se, he filed his complaint with the LaPorte Superior Court on May 29, 2007. In it, he alleged that Dr. Mitcheff made misrepresentations, fraudulently induced Perkins’ consent to the surgery, and negligently failed to provide a new prosthesis or a conformer. As of filing the complaint, he was still wearing the 1998 prosthesis, and his symptoms persisted.

Perkins’ action was consolidated with another he had filed in the LaPorte Circuit Court. Dr. Mitcheff filed a motion to dismiss. Perkins filed a response and attached an affidavit, in which he asserted that he was under Dr. Mitcheff’s continuing care until September 7, 2005. The trial court granted the motion. Perkins then filed a motion for leave to amend his complaint. The trial court held a hearing on Perkins’ motion, treated Dr. Mitcheff’s motion to dismiss as a motion for summary judgment, and granted Dr. Mitcheff’s

motion, concluding that the complaint was untimely.

Discussion and Decision

Perkins appeals and argues that the trial court erred in granting Dr. Mitcheff's motion for summary judgment. Although Dr. Mitcheff filed a motion to dismiss, we review the trial court's grant of summary judgment in his favor.

If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.

Ind. Trial Rule 12(B). Therefore, as Perkins submitted an affidavit not attached to his complaint, the trial court properly treated the motion as one for summary judgment. Where this occurs, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Id. Here, no additional time was necessary because it was Perkins' submission of an affidavit that triggered this provision of Indiana Trial Rule 12(B). Dr. Mitcheff did not submit any additional evidence. Thus, Perkins needed no additional time to respond to the motion. See Murphy Breeding Lab., Inc. v. W. Cent. Conservancy Dist., 828 N.E.2d 923, 926 n.9 (Ind. Ct. App. 2005); and Azhar v. Town of Fishers, 744 N.E.2d 947, 951 (Ind. Ct. App. 2001).

The trial court shall grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

In reviewing the entry of summary judgment, we apply the same standard as the trial court. Filip v. Block, 879 N.E.2d 1076, 1080 (Ind. 2008), reh'g denied. We construe all facts and reasonable inferences in favor of the nonmoving party. Id.

Perkins argues that the trial court erred in concluding that his complaint was barred by Indiana Code Section 34-18-7-1(b), the statute of limitations in the Medical Malpractice Act (“Statute of Limitations”). The Statute of Limitations prohibits bringing claims for medical malpractice unless filed within two years after the alleged act, omission, or neglect. Ind. Code § 34-18-7-1(b).

More specifically, Perkins asserts that the doctrine of continuing wrong delayed the beginning of the Statute of Limitations period. This doctrine applies where an entire course of conduct combines to produce an injury. Boggs v. Tri-State Radiology, Inc., 730 N.E.2d 692, 699 (Ind. 2000). “[I]t defines when an act, omission, or neglect took place.” Id. Where the doctrine applies, the Statute of Limitations does not begin to run until the wrongful act ceases. Id.

Perkins alleged that Dr. Mitcheff made misrepresentations, fraudulently induced Perkins to consent to the surgery, and negligently failed to provide a new prosthesis or a conformer. Any representations about the surgery, performed in September 2003, would have occurred prior to the procedure. Even if misrepresentations were made, the documents from the grievance process reflected the DOC’s written denial of a new prosthesis. The last of the grievance documents included in the record is the DOC’s Step 5 letter, dated July 19, 2004, denying provision of a new prosthesis. Even assuming, for purposes of argument, that the doctrine of continuing wrong applies to Dr. Mitcheff’s representations, the misrepresentation did not extend beyond Step 5 in the DOC’s grievance process, when the DOC stated clearly that it would not approve a new prosthesis. Therefore, any claim

regarding misrepresentation or fraudulent inducement would have to have been filed no later than July 19, 2006. Perkins did not file by that date.

Nor can Perkins overcome summary judgment with his claim that Dr. Mitcheff negligently failed to provide the conformer. The grievance documents make clear that the DOC approved Perkins' receipt of a conformer; Perkins acknowledges as much. Appellant's Br. at 30. Although Perkins claimed that Dr. Mitcheff negligently failed to provide the conformer, none of his factual allegations support the claim. Therefore, summary judgment was proper.

Conclusion

Perkins' complaint was not filed timely. Accordingly, the trial court did not err in granting Dr. Mitcheff's motion for summary judgment.

Affirmed.³

MATHIAS, J., and BARNES, J., concur.

³ On appeal, Perkins states he is "now being told that [DOC's] Central Office had only approved a 'conformer,' which is a clear piece of plastic. The Indiana State Prison Medical Staff was under the assertion that central office had approved [his receiving a new prosthesis]." Appellant's Brief at 2-3.